

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

OGC 76-2892
6-1-76

OGC SUBJ: SECURITY

MAY 25 1976

Honorable George Bush
Director of Central Intelligence
Washington, D. C. 20505

Dear George:

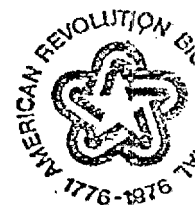
In response to your request, I have had the DoD General Counsel review the proposal that the National Security Council Intelligence Decisions (NSCIDs) contain, in addition to security classification markings, notations that they are protected from disclosure by a specified statute. See the suggested notations in Attachment A which refer to 50 U.S.C. 403(d)(3), 50 U.S.C. 403g., 18 U.S.C. 798(a)(3), and Public Law 86-36.

It is our judgment the inclusion of appropriate notations on the NSCIDs, indicating that the material is specifically exempted from disclosure by statute, would aid the Government in defending against Freedom of Information Act suits to compel disclosure.

The Freedom of Information Act, 5 U.S.C. 552(b) permits an Agency to exempt from public disclosure matters that are - "(1)(A) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; and (B) are in fact properly classified pursuant to such Executive order." Previous to the 1974 Amendments to that Act, the Government was only required to establish (A). As the 1974 Conference Report (Senate Report No. 93-1200) notes, the Government is not only required to establish that the record was marked classified pursuant to an Executive order requirement, but also that a determination has been made that the record is "properly classified pursuant to both procedural and substantive criteria contained in such Executive order." The net effect is that the Government has the burden of showing that national security is involved, and that its release could reasonably be expected to cause damage to the national security. In support of the latter, the Government must establish a reasonable basis to support its classification determination. (120 Cong. Rec. H 10865 (November 20, 1974)). In some instances this may be done through testimony and affidavits, and in others, the Court may order the records turned over for its personal review in camera. Klaus and Halperin v. National Security Council and Kissinger, U.S. Dist. Ct. of D.C., Civil Action 75-1093, which is now being litigated, involves a challenge to the Government's refusal to declassify and release NSCIDs published February 17, 1972. The NSCIDs contain the security classification markings required by Executive order, but no statement that the Directive is protected from disclosure by a designated statute.

OSD Declassification/Release
Instructions on File

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The Freedom of Information Act also permits an agency to exempt from public disclosure matters that are "specifically exempted from disclosure by statute." H. Rept. 1497, 89th Cong., 2d Sess., p. 10 states that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160 (which became the Freedom of Information Act)."

The Attorney General's memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, commented that there were a wide variety of statutes which restrict disclosure, and cited specific examples, including 50 U.S.C. 403g which exempts publication or disclosure of the CIA organization, its functions, or its personnel.

In a Committee Print, "Federal Statutes on the Availability of Information", by the House Committee on Government Operations, 86th Congress, Second Session, March 1960, there appears a number of statutes which prohibit public disclosure on the grounds of national security. 50 U.S.C. 403g. is again cited, as is 18 U.S.C. 798 which prohibits disclosure of communications intelligence information. Although not cited in either compilation it is apparent that Public Law 86-36 (which exempts disclosure of National Security Agency organization, functions and personnel) deserves the same recognition as its CIA counterpart statute, 50 U.S.C. 403g.

Turning to the case law on the subject, there are a number of decisions supporting the statutory exemption provision. Administrator, Federal Aviation Administration v. Robertson, 95 S. Ct. 2140 (1975) noted (p. 2148) that "when Congress amended the Freedom of Information Act in 1974, it reaffirmed the continued validity of this particular Exemption, covering statutes vesting in agencies wide authority." 50 U.S.C. 403(d)(3), 50 U.S.C. 403(g) and Public Law 86-36 are such statutes.

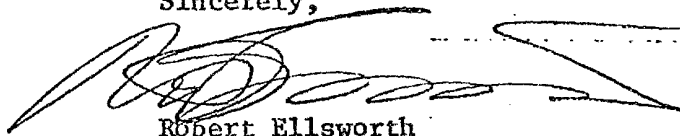
In Richardson v. Spahr, et al., U.S. Dist. Ct. W. Dist. Pa. (January 30, 1976), Civil Action 75-297, the Court granted the Government's motion for summary judgment on the grounds that the Freedom of Information Act specifically exempts from disclosure financial records which reflect CIA transactions from the inception of the agency. Specifically cited were the statutes, 50 U.S.C. 403g; 50 U.S.C. 403j(b); 50 U.S.C. 403j(a) which, in the words of the Court "clearly and unequivocally reflects the approval of Congress for the secrecy involved in funding and operating intelligence operations." Also cited in support of denying the request was the responsibility of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure, 50 U.S.C. 403(d)(3).

A similar holding was made in Phillippi v. CIA, U.S. Dist. Ct. for D.C. (1975), Civil Action 75-1265. When Plaintiff sought permission to take part in an in camera examination of certain CIA documents, the

Defendant objected. After reviewing the agency's affidavits, the Court ruled that any materials which fit the description of materials sought by the Plaintiff are exempt under the "statutory exemption", citing Administrator, Federal Aviation Administration v. Robertson (supra), and Knopf Inc. v. Colby, 509 F. 2d 1362, cert. denied, 95 S. Ct. 1555 (1975). Two other District Court holdings are to like effect. Bachrack v. CIA and Colby, Civil Action 75-3727, and Weissman v. CIA, et al, Civil Action 75-1583. Both the Richardson and Phillippi cases have been appealed.

In summary, the legislative history of the Freedom of Information Act and case law support the proposal that if NSCID documents contain material protected by the aforementioned statutes, they should be so marked. As indicated heretofore, proving that documents are exempt on security classification grounds is more difficult under 50 U.S.C. 552b(1), than proving the existence of a statute which specifically exempts information from disclosure. As Justice Stewart noted in his concurring opinion in Administrator, Federal Aviation Administration v. Robertson (supra), "As matters now stand, when an agency asserts a right to withhold information based on a specific statute of the kind described in Exemption 3, the only question to be determined in a district court's de novo inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be."

Sincerely,



Robert Ellsworth

This directive, authorized by the National Security Council, relates to intelligence sources and methods, as defined in 50 U. S. C. 403(d)(3), which, by statute and this directive, the Director of Central Intelligence is directed to protect from disclosure.

This directive, authorized by the National Security Council, pertains to functions to be performed by the Central Intelligence Agency and the Director of Central Intelligence, which the Director is likewise directed to protect from disclosure by 50 U. S. C. 403g and this directive.

This directive (s) relates to communications intelligence which by statute, 18 U. S. C. 798(a)(3), and this directive are exempt from disclosure. It also pertains to the organization or function or activities of the National Security Agency which are protected from disclosure under P. L. 86-36.

Additionally acting pursuant to E. O. 11652, the National Security Council has classified this directive at the level of _____ on the grounds that its disclosure could reasonably be expected to cause _____ damage to the national security.

ADDENDUM

The General Counsel recommends that the third paragraph of Attachment A be modified so that the notations would not be confined to the specific statutes cited. Instead, it would state that the information is protected by statutes, including among others 18 U. S. C. 798(a)(3) and Public Law 86-36.

Robert T. Anderson